STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 11, 2004
v	No. 242322 Wayne Circuit Court
DWIGHT MONK, Defendant-Appellant.	LC No. 01-006688-01

Before: Cavanagh, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree murder, MCL 750.316(a), assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. We reverse and remand for a new trial.

Defendant argues that a new trial is required because he did not receive the effective assistance of counsel. We agree.

To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) a reasonable probability that, but for the attorney's error, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). A reasonable probability is one sufficient to undermine confidence in the outcome. *Carbin, supra* at 600. A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001). A defendant claiming ineffective assistance of counsel must overcome the strong presumption that the attorney was exercising sound strategy. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

Defendant's ineffective assistance claim is predicated on his attorneys' failure to produce and subpoena three alibi witnesses. One of the witnesses apparently came to court on the day of

trial, but defendant's trial counsel failed to make contact with her and she never testified. The other two witnesses were never subpoenaed or notified of the trial. All three witnesses testified at a *Ginther*[1] hearing that they would have testified at trial that defendant was with them, at his home in Detroit, at the time the two victims were shot. Defendant's trial counsel testified at the *Ginther* hearing that he had expected his co-counsel to subpoena and produce the alibi witnesses. The co-counsel testified that he was never formally retained as defendant's trial counsel, and that he never made a commitment to produce and subpoena the alibi witnesses.

These circumstances satisfy both prongs of the *Pickens* test. The failure to subpoena and produce the alibi witnesses was objectively unreasonable, because defense counsel missed an opportunity to present an alibi defense, which might well have been defendant's only viable defense available. Defendant established at the *Ginther* hearing the factual predicate for his claim that these witnesses would have given favorable testimony supportive of an alibi defense. *Id*. Defendant also established that the witnesses' failure to attend trial was attributable to his attorneys' mistakes. Both attorneys knew of the witnesses. They filed alibi notices, and trial counsel referred to them in his opening statement. There is no indication that either attorney decided against calling them as a matter of strategy. On the contrary, when the witnesses were not present for trial, trial counsel urged the trial court to allow more time for their arrival. Because neither attorney produced the witnesses, defendant lost the opportunity to present an alibi defense. There is no record support for the trial court's suggestion that the witnesses failed to appear because they did not want to testify. Even if this was true, however, one or both of defendant's attorneys performed deficiently by failing to serve subpoenas to compel their attendance.

This analysis applies even if Shanae McGhee's failure to testify was partly attributable to her own failure to make contact with trial counsel on the second day of trial. Moreover, defendant was still deprived of the alibi testimony of Lacresha Harris and Leon Jeffery, who seemingly would have been more credible than McGhee, defendant's girlfriend and the mother of his children. Generally, counsel's decision whether to call a witness is presumed to be a strategic one for which this Court will not substitute its judgment. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). However, this case does not involve an attorney's strategic decision not to call a witness, but rather the failure to produce and subpoena witnesses after deciding to call them. Unintentional failure to produce or subpoena alibi witnesses cannot be considered sound trial strategy. *Knapp, supra*.

The error also satisfies the prejudice requirement. *Carbin, supra* at 599-600. With the witnesses, defendant could have presented a positive defense; without them, he could only try to detract from Carlos Starks' testimony. Although it is by no means certain that the jurors would have found the alibi witnesses more credible than Starks, especially given their personal associations with defendant, defendant nonetheless has established a reasonable probability of a different outcome. A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." *Carbin, supra* at 600. Our confidence in this verdict is undermined

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

because the jurors heard only the prosecution's case when it might have heard a credibility contest between Starks and the alibi witnesses.

We are not persuaded by the prosecutor's argument that defendant cannot show prejudice because he could have testified to his own alibi and because identification was not an issue. Defendant's own testimony was not a reasonable substitute for the alibi witnesses' testimony. The option of testifying on his own behalf was one prong of the dilemma between presenting no alibi defense, or giving only self-serving, uncorroborated testimony. Defendant recognized this dilemma by complaining that he would look "stupid" in front of the jurors if he testified that he was with three other people who were not there to support him. The Hobson's choice between remaining silent and appearing a liar did not protect defendant from prejudice. Nor can the prosecution plausibly argue that there was no prejudice because Starks' ability to identify defendant was not at issue. There was evidence that the relationship between defendant and Starks was contentious, and defendant's identity as the perpetrator was still an issue. Defendant was prejudiced by the lost opportunity to support his contention that Starks falsely accused him out of personal animosity.

Accordingly, we reverse defendant's conviction and remand for a new trial. Because this issue is dispositive of defendant's appeal, it is unnecessary to consider defendant's remaining issues.

Reversed and remanded. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Brian K. Zahra